

**Editor's note: aff'd, sub nom. Valley Camp of Utah, Inc. v. Lujan, Civ. No. 91-C-1264J (C.D. Utah, Feb. 1, 1993); appeal filed, No. 93-4067 (10th Cir. April 5, 1993), rev'd, remanded to D.Ct. to vacate its judgment (May 20, 1994) 24 F.3d 1263**

VALLEY CAMP OF UTAH, INC.  
COASTAL STATES ENERGY CO.

IBLA 91-9

Decided August 5, 1991

Appeals from decisions of the Utah State Office, Bureau of Land Management, denying a protest of a sublessee of Federal coal lease U-020305 that it was not properly notified of lease readjustment, and increasing bond coverage to insure payment of royalty on production from coal lease U-020305.

Affirmed.

1. Coal Leases and Permits: Assignments and Transfers--Coal Leases and Permits: Readjustment--Coal Leases and Permits: Royalties

A Federal coal lessee's election not to seek review of lease conditions to determine whether a royalty rate less than 8 percent was warranted for underground operations is not subject to challenge by a sublessee.

2. Coal Leases and Permits: Readjustment

Objections to readjusted terms of a Federal coal lease did not delay the effective date of the readjusted lease under provision of Departmental regulation 43 CFR 3451(d) (1981).

APPEARANCES: John S. Kirkham, Esq., Salt Lake City, Utah, for Valley Camp of Utah, Inc.; Kevin L. Yocum, Esq., Salt Lake City, Utah, for Coastal States Energy Company.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Valley Camp of Utah, Inc. (Valley Camp), has appealed from decisions of the Utah State Office, Bureau of Land Management, dated August 27 and 28, 1990. Coastal States Energy Company (Coastal States) also has appealed

from the August 27, 1990, decision. <sup>1/</sup> The latter decision denied Valley Camp's March 19, 1990, protest that, as a sublessee of Federal coal lease U-020305, it was not formally served with the required notice of lease readjustment made effective on May 2, 1982. The earlier decision, addressed to Coastal States as the lessee of record for U-020305, concluded that the lease was readjusted with an increased royalty rate effective May 1, 1982, and increased bond for unpaid royalty obligations pending appeal. BLM further stated that it was the "conclusion of this office that Coastal States Energy Company is the lessee of record and is responsible for compliance with all terms and conditions of Coal Lease U-020305 including bond coverage." Valley Camp has petitioned the Board for an order staying the effectiveness of the August 27, 1990, decision. For reasons explained below, this petition is denied.

Lease U-020305 has been before this Board twice previously. Before considering the arguments raised in this appeal and how our prior review of the lease relates to the questions now before us, the issuance and relevant assignments affecting the lease must be described.

Effective March 1, 1962, the lease was issued to Emmett K. Olsen for 1,439.40 acres in Carbon and Emery Counties, Utah, within the Manti-LaSal National Forest, under section 1 of the Mineral Leasing Act, as amended, 30 U.S.C. § 181 (1988). Soon after the lease was issued to Olsen, an assignment to Malcolm N. McKinnon (assigned rights in the lease later passed to his estate) was approved by BLM effective August 1, 1962. Subsequent exploration determined that the Connelville Fault divided the lease into two separate mining blocks. The lease lands east of the fault were identified as the "O'Connor block," while the western lands comprised the "Connelville block."

Effective June 1, 1976, a series of "subleases" were approved by BLM, including a "sublease" of the entire lease to Routt County Development Company (RCD), dated October 29, 1975 (pursuant to an option to acquire

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<sup>1/</sup> The opening paragraph of the statement of reasons (SOR) announces that it is filed on behalf of Valley Camp and that Valley Camp is joined in the appeal by Coastal States as lessee-of-record. Coastal States participation is explained later in the SOR:

"Coastal States joins in this appeal as the lessee of record in order to allow Valley Camp to obtain a full administrative review of its legal rights as sublessee of record of the Lease. \* \* \* Insofar as it is deemed necessary by the Board the lessee of record is a named party in the present appeal. In order to obtain a full and complete resolution of the issues raised by Valley Camp, Coastal States acknowledges that the appeal is taken on its behalf." (SOR at 6).

Because the SOR does not include arguments that relate to any interest or right of Coastal States as the lessee of record, our discussion will treat the appeal for what it is--an appeal by Valley Camp.

the lease negotiated by Oak Creek Development on May 10, 1974, and assigned to RCD on August 1, 1974). This was preceded by a "sublease" of the lands encompassing the O'Connor block (often identified in the documents as the "Routt Sublease") to Energy Fuels Corporation (pursuant to an agreement dated September 15, 1975), who then assigned this sublease to Valley Camp (by an exchange dated September 15, 1975). The next BLM approval of transfers involving the lease was effective January 1, 1979. On August 3, 1978, RCD assigned its interest in the sublease from the McKinnon Estate, including its reversionary interest but excluding its royalty interest in the Routt Sublease, to Coastal States. Finally, in February 1983, BLM approved assignment of lease U-020305 from the McKinnon Estate to RCD and then to Coastal States effective March 1, 1983.

Lease U-020305 is included with other coal leases in two separate, operating mines. The O'Connor block, which includes the Valley Camp sublease, is included within the Belina Mine, operated by Valley Camp. The Connelville block is within the Skyline Mine, operated by Coastal States. Mining plans and permit applications have been filed for both mines and they are operational.

By notice dated October 6, 1981, the lessee-of-record was informed by BLM that the terms of the lease would be readjusted "under the provisions of 43 CFR [Subpart] 3451." Terms of readjustment were provided the lessee by notice dated February 22, 1982, and the lessee timely objected. In a November 10, 1982, decision, BLM readjusted coal lease U-020305 effective May 1, 1982, and also overruled various objections of the lessee and sustained others. The lessee appealed to this Board.

In Coastal States Energy Co., 81 IBLA 171 (1984) the Board affirmed BLM in part, set aside part of the BLM decision under review, and remanded the case file to BLM for further action. On May 28, 1985, BLM issued a decision implementing the Board's decision. The lessee appealed this decision to the Board. Meanwhile, the lessee sought judicial review at approximately the same time as BLM issued its implementation decision. The District Court of Utah issued an order in Coastal States Energy Co. v. Hodel, No. 85-C-06655 (D.Utah, Mar. 2, 1988), remanding the matter to the Board with directions that further review proceedings be in accord with the ruling of the U.S. Court of Appeals for the Tenth Circuit in Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir.1987), a similar but unrelated case holding that it was error for the Department to automatically readjust the royalty rate for underground coal to 8 percent.

In Coastal States Energy Co., 105 IBLA 64 (1988) the Board affirmed in part, set aside in part, reversed in part and remanded BLM's implementing decision. On remand, BLM was to (1) correct section 12 of the readjusted lease to add a phrase (deleted during the implementation stage) concerning the impact of operations, and (2) review the royalty rate imposed on the production of underground coal from the lease. On October 17, 1988, the Department, the State of Utah, and the lessee-of-record entered into a memorandum of understanding (MOU) wherein the lessee agreed to a royalty rate of 8 percent for underground coal produced from the subject lease and

others, and the termination of administrative proceedings for those of the lessee's leases which involved the royalty rate issue. This settlement was reaffirmed by the lessee in a letter to BLM dated April 18, 1990. 2/

Valley Camp filed a petition to intervene in the second appeal to the Board, contending it would be adversely affected by BLM's implementation of the lease readjustment. Noting that an appeal pending before the Minerals Management Service from a royalty deficiency determination dated May 2, 1986, concerned the issue whether the terms of readjusted lease U-020305 were effective against Valley Camp as sublessee, the Board denied the petition. 105 IBLA at 64 n. 1. By letter filed with BLM on March 21, 1990, Valley Camp sought "to expedite the review" of several issues concerning the lease. Explaining that it had not been informed of a BLM decision reviewing the royalty rate matter on remand from the Board, Valley Camp argued that a royalty determination would not be effective against it until after such notice was received. Valley Camp also asserted that until the royalty determination proceedings were completed in accordance with the Board's remand, a new royalty rate was not established and therefore the previously applicable rate must be enforced.

In its August 27, 1990, decision, BLM informed Coastal States that pursuant to the 1988 MOU, all terms of readjusted lease U-020305 were considered established and effective May 1, 1982. BLM instructed Coastal States that the lease bond provided by the sublessee Valley Camp to insure payment of accruing royalty pending appeal was inadequate. BLM ruled that the bond amount must be increased. BLM also held that recovery of 61,000 tons of coal by Valley Camp's operation was jeopardized by its mining methods and that BLM would retain \$120,000 of the current lease bonds unless the resource was recovered. In the August 28, 1990, response to Valley Camp's March protest letter, BLM ruled that it was not necessary for Valley Camp to receive notice of readjustment because it was a sublessee and not the lessee of record for U-020305. BLM concluded that, because the royalty rate matter had been resolved between the lessee and BLM, further review of the lease was not required.

Valley Camp, on appeal, argues that this appeal raises issues that relate

to the effective date of the readjustment of the Lease as prescribed by the regulations and the obligations imposed by the

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2/ The letter states:

"Please be advised that Coastal States Energy Company will not request that further review or analysis be conducted by the Bureau of Land Management with respect to those readjustment/royalty rate appeals filed by Coastal and remanded from the Interior Board of Land Appeals to the Utah State BLM Office. Coastal agreed to the 8 percent royalty rate, subject to royalty review and rule-making by the Department of the Interior, in the Memorandum of Understanding dated October, 1988, between the Department of the Interior, State of Utah and Coastal."

Board upon the Bureau of Land Management ("BLM") with regard to the establishment of the royalty rate for the period of the readjustment. These issues have not been addressed in prior appeals.

(SOR at 1). Valley Camp asserts that, contrary to the reason given for the August 27, 1990, bond increase ruling, BLM cannot establish a royalty rate for the lease without first making a royalty determination in accordance with the remand from the Board and the district court. Further, Valley Camp contends that royalty readjustment cannot be effective before October 28, 1990, the earliest date which is at least 60 days after the readjustment terms were submitted to the lessee.

[1] Because competing mine operations partition lease U-020305 into distinct segments, Valley Camp contends that any royalty rate determined to be applicable to Coastal State's Connelville block operations will not take into consideration different conditions encountered in the O'Connor block. Arguing that the Tenth Circuit in Coastal States established that under the regulations then in effect BLM must make a determination whether a lower rate is warranted for underground operations, Valley Camp contends BLM is here obligated to establish a royalty rate upon readjustment only after reviewing conditions at the lease. Citing Kanawha & Hocking Coke & Coal Co., 112 IBLA 365 (1990) involving a lease also encompassed by the Skyline Mine, Valley Camp avers that the record does not contain the reasoned and factual explanation required in such cases. Arguing that an underground coal royalty rate for the O'Connor block has not been established pursuant to such a review, and that a reasoned basis for decision is not evident on the record, Valley Camp asserts that the 1988 MOU does not apply to the O'Connor block. <sup>3/</sup>

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<sup>3/</sup> Although in Coastal States, 105 IBLA at 64 n. 1, we held that Valley Camp lacked standing to intervene because of its pending appeal before MMS, we now consider its arguments on appeal here notwithstanding the MMS appeal. Departmental regulation 43 CFR 4.410(a) provides that "[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management \* \* \* shall have a right of appeal to the Board." While Valley Camp was not a party to the case in the prior Coastal States appeal, it has become so here because of its written protest of March 1990. In the former appeal, there were no distinct arguments advanced by Valley Camp concerning the lease separate from those presented by Coastal States to show that Valley Camp had suffered any adverse affect from the BLM decision. In that situation, any determination by the Board regarding the imposition of the readjusted terms and conditions would be collaterally effective against all other parties. While BLM is delegated responsibility for the management of the lease, MMS is responsible for collection of the royalties. Valley Camp's prior challenge focused on the question of liability to pay regardless which royalty rate was applied. Thus, with respect to Valley Camp's position at the time

Valley Camp quotes from a 1982 Environmental Assessment prepared by BLM staff for the proposition that "Coastal States and Valley Camp retain control of lease U-020305 at the present time" (SOR at 11). This evaluation is, however, misleading in the present context. The transfer made from McKinnon to RCD in 1975 provided that after RCD had paid the required amount, McKinnon would "execute and deliver to [RCD] assignments of all right, title and interest in the federal coal leases covering the leased premises as provided." This arrangement was therefore a purchase contract allowing RCD to operate on the lands pending final assignment of the lease. It is in stark contrast to the conveyance to Valley Camp defined by item 18, Relationships of Parties, of the sublease from RCD to Energy Fuels (the sublease later assigned by Energy Fuels to Valley Camp), which reads:

It is fully understood that the relationship between the parties hereby shall be that of landlord and tenant governed by the present or future laws of the State of Utah and that such relationship shall never be interpreted or established as that of partners, joint venturers, cotenants, principal and agent, or any relationship other than that of landlord and tenant.

(Sublease dated Jan. 1, 1978, at 13). The distinction between an assignment and a sublease rests on the assumption that there is no privity of estate or contract between the original lessor and a sublessee. See 3A Thompson on Real Property § 1210 (1959 ed.); 1 Tiffany Real Property §§ 123, 124 (1939 ed., Feb. 1989 Supp.); 1 American Law of Property § 3.62 (1952 ed.); 3 American Law of Mining § 16.71 (1982 ed.). For a discussion of Utah law on this subject, see Heiner v. S.J. Groves & Sons Co., 790 P.2d 107, 112-15 (Utah App. 1990). A sublease, as distinguished from an assignment of the entire leasehold, is created when the lessee, generally under a requirement that there be approval from the lessor, assigns less than his full interest in the lease, customarily done by transferring an interest in the lease for a period less than the full lease term or by retaining a reversionary right or right of reentry. As the sublessee enters the property under the title of the lessee, the sublessee's liability runs only to the lessee who is in turn responsible to the lessor. Though the sublessee is not personally liable to the lessor, the making of the sublease does not diminish any rights of the lessor. The lessor may properly condition its consent to subleasing upon a right to approve the sublessee and the promise of the sublessee to perform certain responsibilities in place of the lessee.

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fn. 3 (continued)

of the prior Coastal States appeal, no separate management issues concerning BLM's administration were offered to show standing to appeal the BLM decision, and intervenor status was denied. In the instant case, however, Valley Camp challenges BLM's determination concerning its status as sublessee and BLM's application of the readjusted royalty rate to the entire lease without a review of the subleased portion thereof. These issues raised by Valley Camp in its protest and ruled on by BLM are properly before the Board.

As to rents, royalties, and other obligations due the lessor, the lessor can generally enforce such covenants against the sublessee in equity. *Id.*

Valley Camp's association with the lease resulting from the assignment to it by Energy Fuels and from Energy Fuels' agreement with RCD was that of a sublessee. This status is inconsistent with Valley Camp's notion that it should be regarded as a co-lessee. As sublessee, Valley Camp does not have the same rights against the lessor as does the lessee. Conversely, the lessor does not have an obligation to notify or involve the sublessee in discussions with the lessee regarding lease terms and conditions. Nonetheless, Valley Camp asserts that even as a sublessee, it must be notified of the readjustment and allowed to participate in the process. It cites as authority for this argument Consolidation Coal Co., 87 IBLA 296 (1985), wherein the Board ruled that if there are two lessees, each must be given notice of readjustment. Valley Camp further claims that BLM Instruction Memorandum No. 85-644 (Sept. 9, 1985), construing Consolidation Coal, concluded that sublessees should be accorded notice of the readjustment and allowed to participate in determination proceedings. The instruction memorandum states, relevantly:

Because the IBLA decision may affect pending lease readjustments where an assignment of the leases is also pending, please also ensure that copies of the readjustment notices are provided on a timely basis to pending assignees and also to pending and approved sublessees. This will ensure notification to affected parties, as well.

*Id.* Contrary to Valley Camp's assertion, this does not amount to a finding that sublessees are required to be notified of readjustment before it can be legally accomplished. Rather, it indicates, as BLM concludes in the August 28, 1990, decision, that copies of documents provided to the lessee should also be given to the sublessee as "courtesy information and not a requirement of the regulation." *Id.* at 2. BLM's ruling in Consolidation Coal, was premised on "two separate and distinct lessees to the lease at issue [who were] subject to recognition by BLM" resulting from the assignment of an undivided one-half interest in the lease. 87 IBLA at 301. The Board, while noting that the record "does not disclose that either lessee has assumed authority to act for the other," does not suggest that a sublessee would be similarly "subject to recognition by BLM." *Id.* 4/ Because no sublease was at issue in the case, the question was not considered.

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4/ Valley Camp also asserts that the legal status of sublessees recognized by the Board in Mountain States Resources, 111 IBLA 160 (1989), supports its theory that the sublessee should be properly involved in the lease readjustment. However, the Mountain States Resources decision involved a sublessee who, pursuant to a sublease arrangement, agreed to be responsible for the operating aspects of the mine concerned, and the controversy on appeal involved the production requirements for which the sublessee, as operator, was concededly accountable.

There might be a foundation in fact for the argument that circumstances on underground operations of the subleased portion of lease U- 020305 should be reviewed to determine whether a royalty rate for underground coal of less than 8 percent is warranted. Recently, in Kanawha & Hocking Coal & Coke Co., 118 IBLA 364 (1991), the Board set aside readjustment of the underground coal royalty rate for nearby coal lease U-017354, also encompassed by the Belina Mine, and remanded the matter to BLM for determination whether conditions warranted a royalty rate of less than 8 percent. The Board in Kanawha & Hocking Coal & Coke Co., 112 IBLA at 365, also remanded, for a similar determination, coal lease U-073120 of the Skyline Mine held by a lessee other than Coastal States. Nonetheless, Valley Camp is not the lessee of U-020305 and is therefore not in a position to request review of the agreement reached by the lessee and BLM. The subleased portion of U-020305 is governed by the provisions of the whole lease. The MOU negotiated to resolve the readjustment controversy stipulates that Coastal States, as lessee, agreed to an 8-percent royalty rate for the lease. While Valley Camp contends that the rate established by the MOU does not extend to the sublease, no foundation for this assertion has been provided. Although it is a practice of the Department to deal with conflicting conditions arising within a lease containing separate coal mining units by segregating the lease into logical mining units, there is no indication that either Valley Camp or any other party made any effort, prior to readjustment, to segregate the lease. 5/

[2] Arguing that the effective date of readjustment cannot be May 2, 1982, Valley Camp contends that regulations in effect in 1981 control readjustment and prohibit setting an effective date earlier than October 28, 1990. Concerning when a readjustment would take effect, the 1981 regulation provided: "The readjusted lease terms shall become effective either 60 days after the lessee is notified of them, or 30 days after the authorized officer transmits the required information to the Attorney General, whichever is later." 43 CFR 3451.2(d) (1981). Valley Camp argues that, because of the administrative and judicial appeals involved, BLM was obligated to again propose readjusted terms after the Board's remand in

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5/ Departmental regulation 43 CFR 3487.1(f)(3) provides: "All single Federal leases that are included in more than one [logical mining unit (LMU)] shall be segregated into two or more Federal leases. If only a portion of a Federal lease is included in an LMU, the remaining land shall be segregated into another Federal lease." Despite the knowledge that the lease included two separate mining blocks and the existence of various approved plans and permits for mining operations physically separating those blocks, an application for the designation of an LMU identifying the existence of the separate mining blocks (in this case the Skyline LMU encompassing the Connelville block of U- 020305), was not submitted until July 29, 1988. The application is pending review; approval of the application will require BLM to segregate U-020305 into two leases. Although the Belina Mine operated by Valley Camp is also, by definition, a LMU, there is no evidence in the present record of the filing of an application to designate it as such.



Coastal States, 105 IBLA at 65. Valley Camp concludes that the August 27, 1990, decision provided new terms and therefore the effect date of those terms could not be sooner than 60 days thereafter, or October 28, 1990.

As Valley Camp correctly states, the 1981 regulation has since been changed. With the observation that few readjustment cases required transmittal of material to the Attorney General, that part of the regulation renumbered as 43 CFR 3451.2(c), was modified by the phrase "if the Attorney General desires to review the readjustment." 47 FR 33114, 33146-47 (July 30, 1982). <sup>6/</sup> Added to paragraph 3451.2(b) was the following sentence: "The effective date of the readjusted lease shall not be affected by the filing of objections to any of the readjusted terms and conditions." Also added was a new paragraph numbered 3451.2(e):

The readjusted lease terms and conditions shall be effective pending the outcome of the appeal, unless the authorized officer provides otherwise. Upon the filing of an appeal, the obligation to pay royalties and rentals when due under the readjusted lease shall be suspended pending the outcome of the appeal. However, during the pendency of the appeal, royalties and rentals shall accrue under the readjusted lease terms and shall be payable if the decision is upheld on appeal, plus interest at the rate specified for late payments in 30 CFR Part 211.

47 FR 33147. Valley Camp contends that these amendments confirm that the prior regulations were not effective while objections to readjustment were pending review. We find, to the contrary, that BLM intended by the amendments to clarify a policy established by statute that an objection to readjusted lease terms and conditions does not stay the effective date thereof. 47 FR at 33129. Because royalty and rental rates are generally not open to negotiation, and the purpose of an objection is to establish which rate set by statute or regulation should be applied in an individual case, the regulatory intent was to provide that the difference between existing and readjusted rentals and royalties would accrue without payment pending resolution of the debate. *Id.* <sup>7/</sup> This makes logical sense, since the determination is a question of law which cannot be affected by an objection, although there may be a necessity for the objection to be made so that the correctness of the legal decision made can be tested.

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<sup>6/</sup> In Kaiser Coal Corp., 103 IBLA 312, 315 (1988) [FNg], transmittal of material to the Attorney General under 43 CFR 3451.1(d) was held to be necessary only when it was requested to be sent.

<sup>7/</sup> The regulations have since been amended to provide that readjusted lease terms and conditions become effective on the anniversary date of the lease. The requirement that objections be filed before appeal has been eliminated. 43 CFR 3451.2 (1988); 53 FR 37296 (Sept. 26, 1988). 43 CFR 3451.2(b) now provides that administrative or judicial review will not delay the effective date of readjustment.

Rejecting the assertion that under the prior regulations the readjustment was not effective pending objection or appeal, the Board has repeatedly held that BLM may properly establish the effective date of the readjusted lease in the process of the readjustment, and that such date is not dependent upon exhaustion of the review process. Utah International, 107 IBLA 217 (1989), Sunoco Energy Development Co., 84 IBLA 131 (1984) Gulf Oil Corp., 73 IBLA 328, 334 (1983). In Gulf Oil Corp., 73 IBLA at 334, we construed 43 CFR 3451.2(d) (1981), to find that it did not allow a delay of the effective date of readjusted terms due to the filing of objections:

Appellants contend that not until the regulations were amended in 1982 was it provided that "the effective date of the readjusted lease shall not be affected by the filing of objections to any of the readjusted terms and conditions." 43 CFR 3451.2(b) (1982). Although this was not explicitly stated in the prior regulations, they clearly provided that the readjustment would become effective 60 days after receipt of the notice. 43 CFR 3451.2(d) (1981). Contrary to the argument in appellants' statement of reasons, there was no explicit provision in the former regulation that filing objections to the readjustment would postpone the effective date.

Appellant has not shown this prior ruling of the Board is in error or inapplicable here. We therefore adhere to our prior decision and find that the effective date of readjustment was correctly established in 1982.

As for Valley Camp's arguments that new terms have been introduced requiring the readjustment to begin anew, the following evaluation of the coal lease readjustment process demonstrates that negotiations to establish the terms and conditions of the readjusted lease do not postpone the effective date of the readjustment process:

The regulations also allowed the lessee to object within 60 days to the proposed terms of readjustment. 43 C.F.R. § 3451.2 (1981). If the lessee was not satisfied with the BLM's resolution of the objections, the lessee could appeal to the IBLA. 43 C.F.R. § 3451.2(e) (1981), amended July 30, 1982, 47 F.R. 33146. Judicial review of IBLA decisions is to the district courts pursuant to the Administrative Procedure Act. 5 U.S.C. ss 701-06 (1982).

It is apparent from these regulations that readjustment is a process--not a single act. The process is initiated by notice of intent to readjust. \* \* \*

If either the law or the leases themselves required the terms to be final prior to the end of a 20-year period, to be assured of an opportunity to readjust, the BLM would either have to begin the readjustment process several years before the end of

a 20-year period, or deny the lessees the privilege of participating in the readjustment process.

Coastal States Energy Co. v. Watt, 629 F.Supp.9, 14-15 (D.Utah 1985), aff'd in part, 816 F.2d 502 (10th Cir.1987). Within the statutory and regulatory scheme established for coal lease readjustment, a lessee should not be denied the privilege of participation, nor should BLM be compelled to begin the administrative process years in advance, in order to timely reconcile lease terms at the required readjustment date. Accordingly, we find that Valley Camp has not established the May 2, 1982, effective date set for the readjusted terms and conditions of coal lease U-020305 is in error. As for the technical aspects of the lease bond at issue and BLM's decision to increase it, those matters have not been challenged by appellant and therefore are affirmed. 8/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Franklin D. Arness  
Administrative Judge

I concur:

Bruce R. Harris  
Deputy Chief Administrative Judge

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8/ Prior to filing its appeal in this case, Valley Camp posted the increased bond coverage required by BLM in its Aug. 27, 1990, decision.

## ADMINISTRATIVE JUDGE MULLEN CONCURRING WITH THE RESULTS:

I have no difficulty affirming the August 27, 1990, Bureau of Land Management (BLM) decision readjusting the lease terms and calling for an increase in the amount of the Coastal States Energy Company (Coastal) surety bond. I am also able to accept and affirm the August 28, 1990, decision that BLM has the right to readjust the lease terms through negotiations with the lessee (Coastal) without notice to or consultation with the sublessee (Valley Camp) as well as the basis for that determination, which is so clearly set out in the August 28 decision. I find no fault with the end results reached by the majority or with the reasoning they have applied to each decision. However, there is a problem not addressed in the majority opinion. When the August 27 and August 28, 1990, decisions are placed side by side, and interpreted in a manner that does not place them in conflict with one another, the result is somewhat startling and something other than what BLM seeks to achieve. The parties should be made aware of that result.

The lead opinion outlines a series of contractual relationships leading to this appeal. Stated in admittedly simplified terms, this case involves payment of royalties under a lease agreement originally between the Department and McKinnon. Under an agreement called a sublease, McKinnon transferred a portion of the leased lands to Valley Camp, retaining an overriding royalty interest and reversionary right. McKinnon then entered into a similar agreement, also described as a sublease, transferring the remaining leased lands to Coastal while retaining a royalty and reversionary interest. The Department was notified of the conveyances and gave its formal approval to both. Some time later, and after the Department's notice that the lease would be renegotiated, McKinnon sold his remaining interest in the entire lease to Coastal. This conveyance was also approved by BLM.

The leased tract contains two blocks of coal separated by a fault of sufficient size to cause the two blocks to be extracted from totally independent mines. The Belina mine, operated by Valley Camp, lies on the easterly side of the fault and the Skyline mine, operated by Coastal, lies on its westerly side. The lead opinion notes that mining plans and permit applications have been filed for both mines and they are operational. These mines are independently owned and operated, and I assume that they vie for the same market.

The reasoning behind BLM's conclusion that it need not give Valley Camp notice of the readjusted lease (which included a marked increase in the royalty obligation) was firmly stated when BLM held that "it is the position of this office that a sublease is defined as a lease by a lessee to another party of part or all of the premises, thus the responsibility of informing the sublessee lies with the lessee, not the lessor" (Aug. 28, 1990, Decision). Consistent with this interpretation of the various contractual relationships, BLM and Coastal entered into a readjusted coal lease reflecting a negotiated settlement reached by BLM and Coastal. The

readjusted lease is applicable to lands mined by Valley Camp, even though Valley Camp had no opportunity to participate in the negotiations and was given no notice of what the readjusted lease terms would be.

The clear implication of the August 28, 1990, decision is that BLM's only contractual relationship is with Coastal, the lessee, and no contractual rights and duties flow between BLM and Valley Camp. The majority opinion discussion of sublessee's rights supports that conclusion. Neither addresses the effect of the August 28 decision on the Department's right to unilaterally impose the terms and conditions of that settlement agreement upon Valley Camp. This question is not dependent upon the nominal designation of the various agreements, but is directly related to BLM's August 28, 1990, decision that BLM has no contractual obligation to give notice of material changes in lease terms.

When considering the August 28, 1990, BLM decision, the majority opinion considers the effect of conveying less than an entire interest in a lease and accepts the MCKINNON-Valley Camp agreement as a sublease in the strictest sense. Neither BLM nor the majority deem the dealings between BLM and Valley Camp from the time the ink dried on the sublease in 1975 through August 27, 1990, but look only to the 1975 agreement as the basis for finding that there was no contractual relationship obligating BLM to give Valley Camp notice of impending material changes in the terms of the lease agreement. The August 28, 1990, BLM decision, which is affirmed by this decision, precludes any further consideration of contractual obligations which may have been created by the prior dealings between BLM and Valley Camp. The Department can no longer look directly to Valley Camp when seeking compliance with the readjusted lease terms, including the provisions pertaining to payment of royalties. It must look to Coastal.

If the August 28, 1990, decision does not reflect BLM's position that there are no contractual rights or obligations flowing between BLM and Valley Camp, two of the bases for affirming the August 28 decision in the majority opinion give me trouble. The first is the manner in which BLM carried out this Board's directive in the second Coastal decision, Coastal States Energy Co., 105 IBLA 64 (1988). The second is the fact that BLM's position would be in direct conflict with the majority holding that there is no privity between Valley Camp and BLM. This lack of privity would preclude BLM from imposing terms and conditions of the negotiated settlement reached by BLM and Coastal directly upon Valley Camp, even though Valley Camp was not a party to or afforded an opportunity to participate in the negotiations leading to the settlement.

In the second Coastal States decision we directed BLM to review the royalty rate imposed upon production of underground coal. BLM undertook that review and, after what appear to be protracted negotiations, BLM entered into a settlement agreement with Coastal. As previously noted, Coastal is the operator of one of the two mines and purchaser of McKinnon's residual interest. This settlement agreement provided for the imposition of a royalty of 8 percent, the highest rate applicable to underground coal. There is nothing to suggest that Valley Camp was either notified of or asked

to participate in the readjustment negotiations or that it was asked to submit reasons in support of a finding that the royalty imposed upon coal mined from the Belina Mine should be something other than the 8-percent rate set out in the negotiated settlement agreement between Coastal and BLM. In effect, it appears that the decision to impose an 8-percent royalty on the coal mined from the Belina Mine was based upon an examination of the Skyline mine. In Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir.1987), the court focused specifically upon the phrase "if conditions warrant" used in 43 CFR 3473.3-2(a)(3) (1979), when holding that the Department must examine reasons for reducing the royalty. There is nothing in the record to support a conclusion that the Belina and Skyline mines are identical. See the discussion of the facts in Kanawha & Hocking Coal & Coke Co., 118 IBLA 364 (1991), and Kanawha & Hocking Coal & Coke Co., 112 IBLA 365 (1990). Of course, if there is no privity between it and BLM, the settlement agreement is not binding on Valley Camp, Valley Camp has no obligation to pay royalties at a higher rate, and Valley Camp sustained no injury when the Department failed to examine reasons for reducing the royalty upon coal produced from the Belina mine.

If the Department is looking to Valley Camp for payment of the increased royalty, it is imposing terms and conditions of the BLM settlement agreement with Coastal directly upon Valley Camp. In doing so, it takes a position totally inconsistent with both the position it announced in its August 28, 1990, decision and the statement in the majority opinion that, because there is no privity between a lessor and a sublessee, "the sublessee's liability runs only to the lessee who is in turn responsible to the lessor." (Emphasis added.) BLM cannot attempt to collect royalties or impose the readjusted lease terms upon Valley Camp and maintain a position consistent with its August 28, 1990, decision and the majority opinion affirming that decision. Further, because Valley Camp has never agreed to be bound by the settlement agreement, the Department must look to Coastal for payment of any assessments which may be levied because of Valley Camp's underpayment of royalties. The assessments must be levied on Coastal. It would be up to Coastal to seek reimbursement from Valley Camp.

If, on the other hand, it has always been and continues to be BLM's position that it is fully able to seek royalty payments from Valley Camp and levy assessments against Valley Camp for underpayment of royalties, the assignment of a leasehold interest to Valley Camp must be something other than the sublease, and a direct contractual relationship exists between the Department and Valley Camp. If this is true, and Valley Camp is not a sublessee, it would not be proper to affirm the August 28, 1990, decision. The decisions in Mountain States Resources Corp., 111 IBLA 160 (1989), and Consolidated Coal Co., 87 IBLA 296 (1985) would be applicable to this case. It stands to reason that if a settlement agreement is to be binding upon a necessary party that party must be a signatory to that settlement agreement.

Affirming both decisions allows only one course of action. BLM must look to Coastal (and only to Coastal) for compliance with the terms and conditions of the lease. As it stands, BLM may impose an increased bond amount pending collection of the additional royalties imposed upon Coastal

but cannot seek payment of those increased royalties from Valley Camp because there is no privity between the Department and Valley Camp. Accepting the two decisions as not being in conflict, I find no need for BLM to make a determination regarding the appropriate royalty for coal produced from the Belina Mine. It has made a determination consistent with the second Coastal States and Kanawha & Hocking Coal & Coke Co. decisions, and that determination is reflected in the settlement agreement between BLM and Coastal. However, BLM cannot impose the terms of either the settlement agreement or the readjusted lease directly upon Valley Camp. The degree to which those agreements are binding on Valley Camp is a matter for Valley Camp and Coastal to resolve. BLM is not privy to the contract between Coastal and Valley Camp.

R.W. Mullen  
Administrative Judge

